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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-221

PEGGY J. CONNOR, ET AL.,
Plaintiff-Appellants,

vs.

JOHN BELL WILLIAMS, GOVERNOR OF MISSISSIPPI, ET AL.,
Defendant-Appellees.

APPEAL FROM THE SOUTHERN DISTRICT OF MISSISSIPPI

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT OF MOTION TO DISMISS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-221

PEGGY J. CONNOR, ET AL.,
Plaintiff-Appellants,

vs.

JOHN BELL WILLIAMS, GOVERNOR OF MISSISSIPPI, ET AL.,
Defendant-Appellees.

APPEAL FROM THE SOUTHERN DISTRICT OF MISSISSIPPI

MOTION TO DISMISS OR AFFIRM

Appellees move the Court, under Supreme Court Rule 16, to dismiss the appeal in that it does not present a substantial federal question as to the claims that (1) a reapportionment decree of a United States District Court should be submitted to the Attorney General of the United States or the United States District Court for the District of Columbia under 42 U.S.C. § 1973c or (2) that variations from the norms substantially under 10% where required for insuring a voice to political subdivisions are violative of the Fourteenth Amendment or (3) that multi-member constituencies drawn to achieve minimum population variances are violative of the Fourteenth Amendment.

Alternatively, appellees move the court to affirm the final judgment of the District Court on the ground that it is manifest that the questions on which the decision of the cause depends are so insubstantial as not to need

further argument: (1) Because the claim for review under the Voting Rights Act of a District Court decree is obviously without merit and because its unsoundness is unmistakably clear from the previous decisions of this court. (2) Because the claim that less than 10% variances when in pursuance of rational state policies violates the Fourteenth Amendment is obviously without merit and because its unsoundness is unmistakably clear from the previous decisions of the court. (3) Because the claim that multimember constituencies constitute a racial gerrymander operating invidiously to deprive a recognizable segment of the population of representation is obviously without merit and because its unsoundness is unmistakably clear from the previous decisions of the court.

It is, therefore, respectfully moved that this appeal be dismissed and, in the alternative, that the judgment of the District Court apportioning legislative districts of the State of Mississippi be affirmed.

Respectfully moved this 12th day of November, 1971.

JOHN BELL WILLIAMS, ET AL.
Defendants

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WILLIAM A. ALLAIN
Assistant Attorney General of the State of Mississippi

HEBER LADNER, JR.
Special Assistant Attorney General of Mississippi

BRIEF IN SUPPORT OF MOTION TO DISMISS

FACTS

While the appellants' statement of the procedural history (i.e. 1966-1971) of the efforts to achieve a constitutionally apportioned legislature are accurate enough, appellees feel compelled to set out another version of events after the March 23, 1971, enactment of H.B. 515. The filing of that Bill with the District Court under its retained jurisdiction (265 F.Supp. 492) revived this litigation. After considering briefs and objections of the parties the court concluded on May 14, 1971, that H.B. 515 was unconstitutional. This determination was prompted by variances in the senatorial plan of 11.60% underrepresentation to 14.26% overrepresentation for some 8 districts.

On May 18, 1971, after considering plans and objections, the court entered an opinion and judgment establishing new districts. Because the jurisdictional statement of the appellants stresses only features of the adopted plan assertedly inimicable to their interest, we will briefly set out the district court's stated rationale for their plan. Based on the reported population figures from the 1970 census, the court found that the norm for a senatorial seat was 42,633 persons and 18,171 persons for a house seat. 82 counties, varying from 2,731 persons to 214,973 persons comprise the state. The court specifically found that only 11 of these 82 counties had sufficient population to elect a senator and only 44 of the 82 could elect a representative.

With this background, the court set about its task of redistricting with the expressed objective of achieving

"*as nearly as possible*, equality in population among the several districts without regard to race, sex, economic status, or place of residence within the state." *Connor* v. *Johnson*, 330 F.Supp. 506 (S.D. Miss. 1971). Within the widely disparate parameters of the county populations, multi-member districts were unavoidable.

The court did not depart from county subdivision lines for several cogent reasons: (1) No dependable population figures were available from smaller entities. (2) County subdivisions fixed by statute for generation were, the court felt, within the knowledge of every citizen, whereas other smaller divisions fluctuated often and were unknown to most inhabitants. (3) Votes of persons in subdivisions truncated from their counties would be practically destroyed.

Thus confined to county subdivisions and restricted to equality of population as the measure, the court found that multi-member districts were inevitable. By realigning districts, the court was able to reduce the variances to under 10% both over and under the norms. Even the 10% disparity is deceptive. Of the 33 senatorial districts, only 3 vary from the norm either way by as much as 9%. Only 4 of the 46 house districts vary by 9%. 21 of the senatorial districts and 26 of the house districts vary less than 6% either way.

Since the multi-member districts as drawn, come under heavy attack, we separately consider them. Three senatorial districts are as large as five counties. Relevant to the claim of racial gerrymandering is the fact that two of the three have *black majorities*. (See maps, appendix 1). The third district (37th District) is substantially white and borders on no county having black majorities. Eight house districts are as large as three counties but given 82 counties and 122 seats, such a result

is not extraordinary. Finally, within these multi-seat constituencies separate seats are distributed to the counties according to population. (Id. at 517-521).

A subsidiary problem of the court authored plan was the distribution of seats in the three largest counties entitled to twelve, seven, and five representatives respectively. Lacking data and time on which to predicate a judgment in this matter, the court retained jurisdiction and stated its intention to appoint a master as of January 1, 1972, to make findings on the feasibility of single member districts for these most populous counties. An interlocutory appeal to this court for a stay of the District Court's Order as it related to these populous counties resulted in a remand for expedited consideration of single member districts. *Connor* v. *Johnson*, 402 U.S. ....., 91 S.Ct. ....., 29 L.Ed.2d 268 (1971). On remand it was found impossible to carve out single member districts in the time required. *Connor* v. *Johnson*, 330 F.Supp. 521 (S.D. Miss. 1971). On June 21, 1971, the application for further stay to enforce this court's mandate was denied. *Connor* v. *Johnson*, 29 L.Ed.2d 722 (1971).

ARGUMENT

I.

Approval of a Federal Court's Reapportionment Decree under the Voting Rights Act Is Not Required.

In the application to this Court for stay of the District Court's May 18, 1971, order as it related to counties electing four or more senators, the court squarely rejected any contention that court decrees are within the coverage of the Voting Rights Act: "A decree of the United States Dis-

trict Court is not within the reach of §5 of the Voting Rights Act." *Connor* v. *Johnson*, 29 L.Ed.2d 270. That determination governs here as the law of the case. *Russell & Co.* v. *People of Puerto Rico*, 118 F.2d 225, cert. granted 314 U.S. 589, 62 S.Ct. 61, 86 L.Ed. 475 (1941), aff. 315 U.S. 610, 86 L.Ed. 1062, reh. den. 316 U.S. 708, 62 S.Ct. 1030, 86 L.Ed. 1775; Developments in the Law—Res Judicata, 65 Harv. L. Rev. 818, 822 (1952).

II.

The District Court's Plan Conforms with the Population Equality Requirements of the Fourteenth Amendment.

Both the rationale and the numerical results of the District Court's plan conform to the guidelines set out in *Reynolds* v. *Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), and its progeny. The District Court's opinion premised the plan upon equal representation for equal numbers of people. Population was slated to be both "the starting point for consideration and . . . the controlling criterion for judgment . . ." *Connor* v. *Johnson*, 330 F.Supp. 507. Where mathematical exactness was not achieved, the failure to do so rests on factors sanctioned by this Court in its review of reapportionment plans. *Swann* v. *Adams*, 385 U.S. 440, 87 S.Ct. 569, 14 L.Ed.2d 501 (1967).

We are aware, as we believe the District Court was, of this Court's reluctance to sanction uncategorically any given percentage variance because such a sanction would compromise the goal of mathematical equality by creating "target" percentages. *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969), reh. den. 395 U.S. 917, 89 S.Ct. 1737, 23 L.Ed.2d 231. Here the court started

with population equality as the standard and labored to harmonize with that standard those elements that make it so difficult of achievement: (1) The happenstance population variances among adjacent counties; (2) The limited possibility of combinations because of large counties which command seats of their own; (3) Necessity for reasonably compact districts and (4) Preservation of the county as a unit of representation.

The District Court's plan was not, in view of the geographic and demographic factors at war with absolutely equal districts, merely a compromise on 10% variance. The 10% outside variance which the District Court appeared to bless in *Connor* v. *Johnson*, 330 F.Supp. 518, does not, as the appellants argue, suggest a defect in methodology. The 10% variance was a result of a good faith effort to achieve parity, not a pre-determined benchmark of the plan.

If the starting point of the District Court's opinion was correct, what of the result? As *Reynolds* and progeny instruct, this is a two part inquiry: (1) The degree of deviation, i.e. how much and (2) The character, i.e. do permissible factors support it. *Reynolds*, supra at 539.

We contrast the result of the District Court's plan with two others found defective:

	District Court Plan	Swann v. Adams	Kilgartin v. Hill
HOUSE OF REPS.	9.823% plus 9.906% minus	18.28 plus 15.27 minus	14.84 plus 11.64 minus
SENATE	9.219% minus 9.584% plus	10.56 minus 15.09 plus	——— ———
RATIO	1.208 to 1 (largest to smallest)	1.41 to 1	1.31 to 1

Several things are at once clear. With the knowledge that the outside variations quoted for the District Court plan are only the most extreme variations, we submit that the District Court's plan, with proper justification, is acceptable and perhaps even acceptable on its face. Although prior to *Kirkpatrick* it could have been argued that smaller variations than those found in *Swann* and *Kilgartin* might be justified by a lesser showing of justification, *Kirkpatrick* seems to require than any departure from virtual equality would require a full showing of acceptable state policy.

The primary consideration justifying departure from exact population equality is that of maintaining the traditional political subdivisions. This is entirely in accord with *Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506, 538 (1964). Appellants desire to convert this well respected consideration into a requirement that county units must be joined together in the traditional way and, by the same token, must not be joined into larger than usual units. We suggest that joinder of counties with new companions or into larger units to achieve greater parity of representation does not weaken the case for insuring a voice for political subdivisions. Moreover, the Court has, in the footnotes to the plan, complied with *Kilgartin's* mandate by showing ways in which respect for county lines justified particular deviations and related these to particular deviations. Id. at 517-521.

III.

The District Court Properly Declined to Hear Evidence on the Racial Aspects of the Plan.

In constructing a constitutional plan of reapportionment, the District Court determined that race should not be a consideration and heard no proof on that issue. Several important considerations support that choice. First, the

plan was that of a court of the United States, the actions of which are untainted by any history of discrimination in Mississippi. *United States* v. *Mississippi*, 380 U.S. 128, 85 S.Ct. 808, 13 L.Ed.2d 717 (1965); *Allen* v. *State Board of Elections*, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969). Similarly, a federal court's plan is not impeached by the actions of state legislatures in allegedly diluting the black vote subsequent to the Voting Rights Act. *Perkins* v. *Matthews*, 400 U.S. 379, 389, ___ S.Ct. ___, ___ L.Ed.2d ___ (1971).

This is not to say the actions of federal courts touching voting rights are presumptively correct. All it signifies is that federal courts' actions are not inherently suspect and should be appraised on their face. Second, introducing racial considerations places the court between Scylla and Charybdis. It cannot purposefully exclude blacks from districts, *Gomillion* v. *Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960), or intentionally include them within districts, *Wright* v. *Rockefeller*, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964). By adhering strictly to population, the federal court avoided unconstitutional consciousness of race. To a great extent, the results vindicate the approach. Blacks have majorities in two of the three largest senatorial districts. No pattern of capricious joinder of black counties with white counties is evident from the districts and the accompanying population statistics which the court may judicially notice. (Appendices 1 and 2).

We acknowledge that the court has foreshadowed circumstances where multi-member districts can operate to cancel out the voting strength of racial elements of the population. *Burns* v. *Richardson*, 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376, 389 (1966). Foreclosing an offer of proof here is not overly harsh against the probabilities of what it might turn up. All except one of the factors set out in *Burns* to facilitate proof of a racial gerrymander are absent. No

district in Mississippi elects a substantial proportion of the seats in either house and all but a few districts have provisions for at-large candidates running from subdistricts. The only tendency conducive to dilution is that both houses of the Mississippi Legislature have multi-member districts. *Whitcomb* v. *Chavis*, 403 U.S. ....., 91 S.Ct. ....., 29 L.Ed.2d 363 (1971). Black majorities in two of the three largest senatorial districts would appear to mitigate this feature of the plan. Moreover, presence of multi-member districts in both houses, given the number of seats and the configuration of the counties, is not easily avoidable.

While the opportunity for demonstrating the invidious effect of multi-member constituencies is theoretically open, it is our position that subsequent decisions of this court, particularly *Whitcomb* v. *Chavis*, have narrowed this avenue to a needle's eye. In short, if the racial composition of the districts taken from census figures do not import discrimination (as by uniting blacks' counties into combinations with preponderantly white counties) proof to the contrary is a frivolous exercise. Certainly, proof that a federal court ordered plan operated designedly to dilute voting strength, *Fortson* v. *Dorsey*, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965) is fanciful.

As to any discriminatory effect of multi-member constituencies, this court in *Whitcomb* v. *Chavis* dealt with and dismissed a wide sweep of such claims. Plural representation with its attendant bloc voting, proportional underrepresentation of residents of identifiable areas, or simply a chronic pattern of losing elections, were all found not to be invidious discrimination. *Whitcomb* v. *Chavis*, 378-381. Equal access to the political system for all groups was, of course, a cornerstone of these findings. This would appear to be true no matter how recently such access has been gained. Such a holding is necessary to square *Chavis* with

earlier cases affirming multi-member districts in the south. *Mann* v. *Davis*, 247 F.Supp. 244 (D.C. Va. 1965) aff. sub nomine, *Burnette* v. *Davis*, 382 U.S. 42, 86 S.Ct. 181, 15 L.Ed. 2d 35 (1965). There multi-member districts for urban Richmond and suburban Henrico Counties were affirmed where dilution of the black vote from 42% to 29% was claimed. *Accord Dusch* v. *Davis*, 387 U.S. 112, 87 S.Ct. 1554, 18 L.Ed.2d 656 (1967); *Goldblatt* v. *City of Dallas*, 414 F.2d 774 (5 Cir. 1969).

IV.

Request for Interim Elections to Implement Single Member Districts Is Premature Pending Final Determination of the District Court; Alternatively, New Elections to Replace Multi-Member Delegations Are Unjustified by the Decisions of This Court.

A decision by this Court of the claim for interim elections in Hinds, Harrison and Jackson Counties would be premature and would invade the yet to be exercised discretion of the District Court. The District Court's opinion in *Conner* v. *Johnson*, 330 F.Supp. 506, 509 (S.D. Miss. 1971), is not a final judgment as to the creation of single member districts. Specifically reserved in that opinion is the right to appoint a special master as of January 1, 1972 to deal with this matter. The interlocutory appeal to this court, *Connor* v. *Johnson*, 402 U.S. ....., 91 S.Ct. ....., 29 L.Ed.2d 268, settled only that single member districts would be "ideal" if found feasible in the limited time before the June 18 deadline for qualification. The resulting remand culminated in the report of a master and a June 16, 1971, Order of the District Court finding it "literally impossible" in the allowable time to create single member districts. *Connor* v. *Johnson*, 330 F.Supp. 521 (S.D. Miss. 1971).

The net result of the failure to subdistrict Hinds County is that the original judgment of the District Court stands. Under its terms, the feasibility and the dimensions of single member districts are open for investigation beginning January 1, 1972. When the master again reports after January 1, 1972, remedial considerations will be open to the District Court and a final judgment will be entered. How deeply into the 1972-1976 legislative term this will come, no one can safely predict. Presently, when there is no finality to the District Court's Judgment, it is inappropriate for this court to act. *Catlin* v. *United States*, 324 U.S. 229, 65 S.Ct. 631, 89 L.Ed. 911 (1945).

Aside from the prematurity of a remedial ruling now, there are strong merit considerations that cut against a prospective ruling on the point. We are not dealing with intrinsically mal-apportioned units such as supervisors' districts, *Taylor* v. *Monroe County Board of Supervisors*, 421 F.2d 1038 (5 Cir. 1969), but with an "ideal" alternative (single member districts) to a constitutionally accepted method of apportionment. (Multi-member districts), *Whitcomb* v. *Chavis*, 403 U.S. ....., 91 S.Ct. ....., 29 L.Ed.2d 363 (1971). According to accepted principles all the representatives in these multi-member districts represent all of the voters. Allowing these representatives to conclude their term does not perpetuate an unconstitutional system.

Decisions of this Court ordering new elections display an intention to limit the remedy to situations where there is minimum disruption or where fundamentally defective elections take place. Thus, new elections were ordered in *Swann* v. *Adams*, 383 U.S. 210, 86 S.Ct. 767, 15 L.Ed.2d 707 (1966), where installation of a new plan was postponed beyond a regularly scheduled election sufficiently distant to permit easy implementation. Sim-

ilarly, the court has freely ordered new elections to replace those marked by fundamental violations. *Hodnet* v. *Amos*, 394 U.S. 358, 89 S.Ct. 1101, 22 L.Ed.2d 336 (1969). These cases grant no leave to order a new election where constitutional means of apportionment linger on for want of time to install a more "ideal" substitute.

V.

There Are No Compelling Circumstances Justifying an Award of Attorney's Fees; No Abuse of Discretion in Proration of Costs.

Attorney's fees are a matter of equitable discretion being granted where defendant's actions are "unreasonable and obdurately obstinate. *Williams* v. *Kimbrough*, 415 F.2d 874 (5 Cir. 1969). Without compelling circumstances, the court need not exercise its discretion to award attorney's fees. Cases where there is statutory authority have no bearing on this issue. *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970), does not indicate a general relaxation of the rule against awards of attorneys' fees. It merely authorized fees in a shareholder's derivative suit in order to spread the costs over all the shareholders, suing and nonsuing alike, through an award against the corporation.

Under Rule 54(d) Fed. R. Civ. P. : "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Here the court ordered the parties to bear their own costs. *Connor* v. *Johnson*, 330 F.Supp. 506 (S.D. Miss. 1971). Reversal of that determination is for an abuse of discretion. (6 Moore's Fed. Prac. 54.70 [5]). It is clear that the court may, where the action was brought in good faith on issues as to which the law is in doubt, require each party to bear their own costs. *Chicago Sugar Co.* v. *American Sugar Co.*, 176 F.2d 1, 11 (7 Cir. 1949). The rule should operate where the action

was defended in good faith and where the actions of the defendants were not oppressive or capricious. The primary case cited by appellants as authority for protecting reapportionment plaintiffs from cost awards does not so hold. *W.M.C.A., Inc.* v. *Simon*, 208 F.Supp. 368, 380 (S.D. N.Y. 1962) holds that no costs should be allowed to or against any party since reapportionment is a matter of public interest.

CONCLUSION

The District Court's plan conforms to the constitutional guidelines of *Reynolds* v. *Sims, et al.* The claims of racial gerrymandering are refuted by the statistics themselves. There is no merit whatever to the claim for approval of the court's plan under the Voting Rights Act.

Appellees submit that the appeal from the Judgment of the District Court establishing legislative reapportionment should be dismissed or, in the alternative, that the judgment and opinion upon which it is based should be affirmed without further briefing or argument.

Respectfully submitted,

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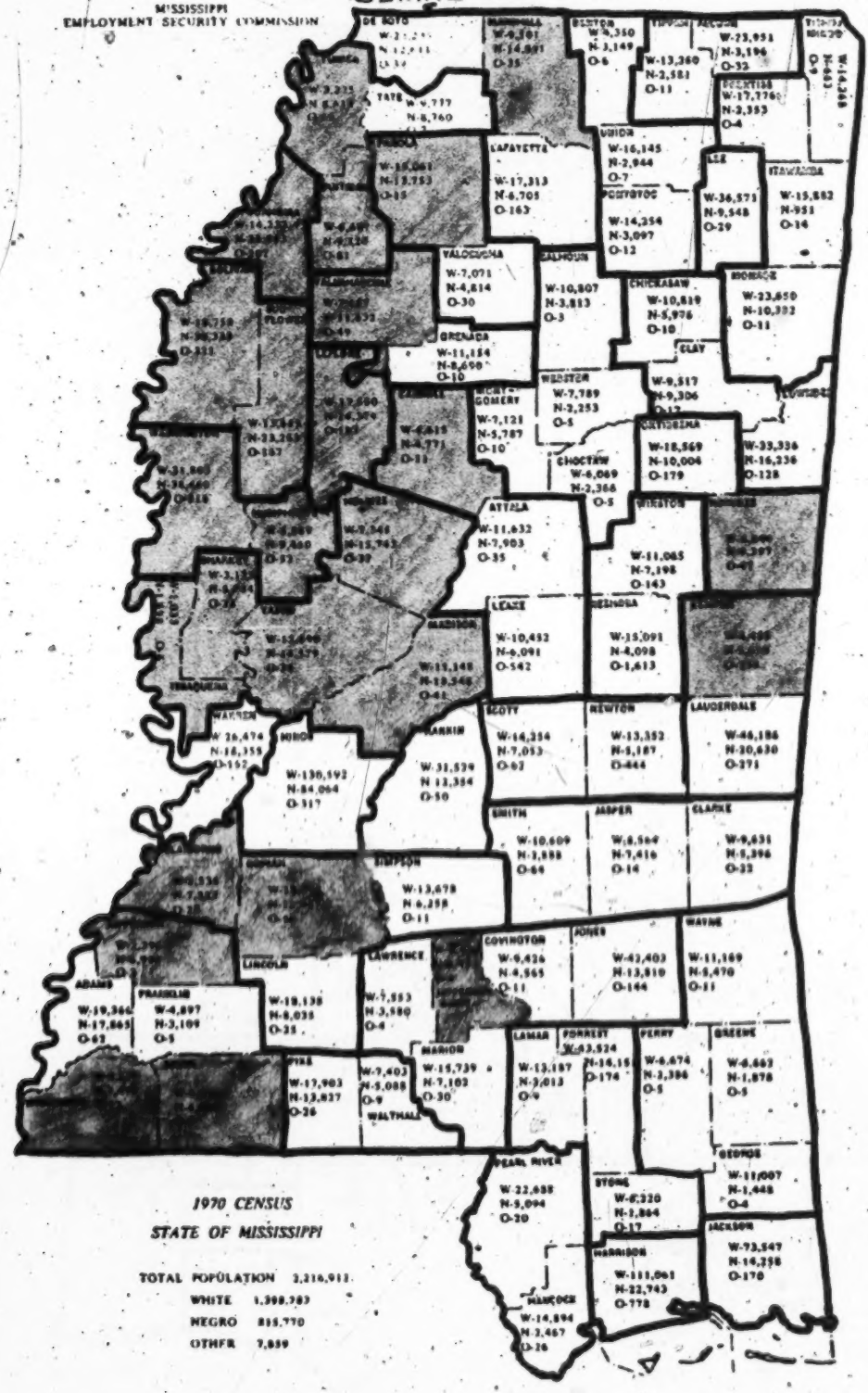
APPENDIX 1

SENATE

MISSISSIPPI
EMPLOYMENT SECURITY COMMISSION



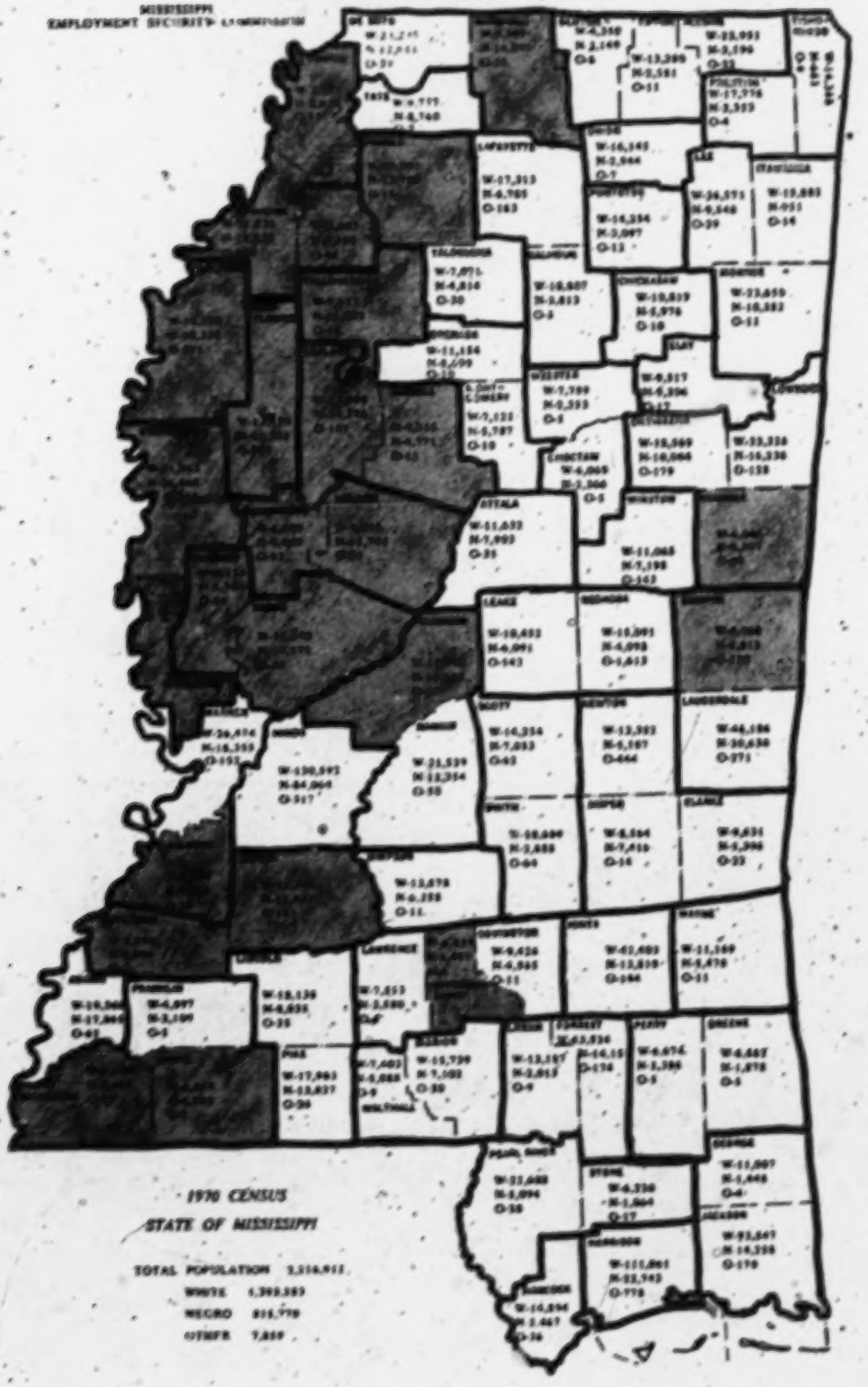
1970 CENSUS

STATE OF MISSISSIPPI

TOTAL POPULATION	2,216,911
WHITE	1,398,783
NEGRO	815,770
OTHER	2,359

APPENDIX 2

HOUSE OF REPRESENTATIVES



APPENDIX 3

I UPPER MISS. RIVER SYSTEM
II LOWER MISS. RIVER SYSTEM
III AMITE RIVER SYSTEM
IV TANGIPAHOA RIVER SYSTEM
V PEARL RIVER SYSTEM
VI JORDAN RIVER SYSTEM
VII WOLF RIVER SYSTEM
VIII BILOXI RIVER SYSTEM
IX TOMBIGBEE RIVER SYSTEM
X LEAF RIVER SYSTEM
XI CHICKASAWHAY RIVER SYSTEM
XII PASCAGOULA RIVER SYSTEM
XIII TOMBIGBEE RIVER SYSTEM
XIV TENNESSEE RIVER SYSTEM

APPENDIX 4

SENATE

I UPPER MISS. RIVER SYSTEM
II LOWER MISS. RIVER SYSTEM
III WHITE RIVER SYSTEM
IV TANGIPAHOA RIVER SYSTEM
V PEARL RIVER SYSTEM
VI JORDAN RIVER SYSTEM
VII WOLF RIVER SYSTEM
VIII BILOXI RIVER SYSTEM
IX TOMBIGBEE RIVER SYSTEM
X LEAF RIVER SYSTEM
XI CHICKASAWHAY RIVER SYSTEM
XII PASCAGOULA RIVER SYSTEM
XIII TOMBIGBEE RIVER SYSTEM
XIV TENNESSEE RIVER SYSTEM